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Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1951

CERTIORARI GRANTED JANUARY 2, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KONRAD G. JOHANSEN, Libelant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellee

STATEMENT UNDER RULE 15(b)

This proceeding was commenced by the filing of the libel on February 8, 1950. Respondent filed an answer to the libel on August 23rd, 1950.

The respondent's motion to dismiss the libel and the libelant's motion for a discovery and inspection were argued, before Hon. Edward A. Conger, D. J., on October 17, 1950.

The memorandum dismissing the libel was filed on December 6, 1950. The memorandum rendering plaintiff's motion moot was filed on December 6th, 1950.

The order dismissing the libel was filed on December 18th, 1950, and the unsigned order was filed on December 18th, 1950.

The order allowing appeal was filed on January 18th, 1951. The assignment of errors was filed on January 25th, 1951.

The parties and attorneys are the same as at the commencement of the action.

[fol. 2] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AD. 164-4

KONRAD G. JOHANSEN, Libellant,

against

UNITED STATES OF AMERICA, Respondent

NOTICE OF APPEAL AND ALLOWANCE

SIR:

Please take notice that Konrad G. Johansen, the libellant in the above entitled suit, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final decree and order of this Court entered herein on or about the 18th day of December, 1950 dismissing the libel herein, and from the final order of this court entered herein on or about the 18th day of December, 1950, denying the libellant's motion for a discovery and inspection on the ground that same has become moot in view of the Court's determination dismissing the libel herein, and from this Court's refusal to sign the counter-order submitted by the libellant so that the record herein might be complete, and from each and every part of said decree, order and determination of this Court.

Dated: New York, New York, January 17, 1951.
Yours, etc., William L. Standard, Proctor for Libellant, 38 Park Row, New York 7, New York.

[fol. 3] To Irving H. Saypol, Esq., Proctor for Respondent, 45 Broadway, New York, New York.

CLERK OF THE UNITED STATES DISTRICT COURT,
Southern District of New York:

The above appeal is hereby allowed.

Dated: New York, New York, January 18, 1951.
Alfred C. Coxe, U. S. D. J.

Filed January 18, 1951.

UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 25, 1951

Libellant hereby assigns error in the final decree of this Court entered herein on or about the 18th day of December, 1950, dismissing the libel herein, and in the final order entered herein on or about the 18th day of December, 1950, denying libellant's motion for a discovery and inspection, and in the determination of this Honorable Court in refusing to sign the counter-order submitted by the libellant in the above entitled suit so that the record herein might be complete, as follows:

[fol. 4] 1. The District Court erred in dismissing the libel.

2. The District Court erred in holding that the libellant had "elected" to accept compensation benefits, thereby waiving his right to sue the respondent for damages for personal injuries occasioned by the fault of the respondent.

3. The District Court erred in holding that the mere filing of a claim for compensation by a civilian seaman, and his receipt of compensation thereafter, constitutes an effective election, where his employer is the United States of America.

4. The District Court erred in failing to hold that a seaman cannot elect to waive his right to sue for damages for personal injuries based on the fault of the respondent, as his employer, unless he has first been made aware of his legal rights in the premises.

5. The District Court erred in failing to deny the respondent's motion to dismiss the libel.

6. The District Court erred in denying the libellant's previous motion for a discovery and inspection.

7. The District Court erred in refusing to sign the counter-order submitted by the libellant, so that the record herein might be complete.

Dated: New York, New York, January 17, 1951.

Yours, etc., William L. Standard, Proctor for Libellant, 38 Park Row, New York, New York.

[fol. 5] To William V. Connell, Clerk; Irving H. Saypol, Esq., Proctor for Respondent, 45 Broadway, New York, New York.

UNITED STATES DISTRICT COURT

LIBEL—February 6, 1950

Suits Under Special Rule for Seamen to Sue Without Security or Prepayment of Fees for the Enforcement of the Laws of the United States, Common and Statutory for the Protection of and for the Health and Safety of Seamen at Sea

Libellant, for his libel, by his proctor, William L. Standard, respectfully alleges:

First: That at all the times hereinafter mentioned, the respondent, United States of America, was and still is a sovereign power which has by law consented to be sued.

Second: That at all the times hereinafter mentioned, respondent owned, operated and controlled a certain vessel known as the U. S. A. T. *Kingsport Victory*.

[fol. 6] Third: That at all the times hereinafter mentioned, and more particularly during the month of August, 1949, libellant above named as well as the seamen and officers comprising the crew of the U. S. A. T. *Kingsport Victory* were in the employ of the respondent.

Fourth: That at all the times hereinafter mentioned, the U. S. A. T. *Kingsport Victory* was a public vessel flying the flag of the United States.

Fifth: That on or about August 5, 1949, while the libellant was in the employ of the respondent as a seaman on the U. S. A. T. *Kingsport Victory* he was caused to sustain serious injuries to his right leg and other parts of his body, while he was working in the vicinity of the 'tween deck of the No. 4 hatch aboard the vessel, when certain lumber was caused to collapse, all by reason of the negligence of the respondent and the unseaworthiness of the vessel.

Sixth: That by reason of all of the foregoing, libellant became sick, sore, lamed and disabled and sustained severe and permanent injuries, and was and is internally and externally injured causing him to suffer great pain and for a long time he was and will be prevented from attending to his daily labers, thereby losing large sums which he would otherwise have earned as wages, and has expended

sums of money in endeavoring to be cured of his injuries aforesaid and to maintain himself, and has endured and will continue to endure great pain and suffering, all to his damage.

Seventh: That all and singular the foregoing matters are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

[fol. 7] Wherefore, libellant prays that respondent be required to appear and answer all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libellant's claim for damages, wages, maintenance and cure in the sum of $25,000, together with the costs and disbursements of this action.

William L. Standard, by Louis R. Harolds, a Member of the Firm, Proctor for Libellant, 38 Park Row, Borough of Manhattan, City of New York.

(Duly verified February 6, 1950.)

UNITED STATES DISTRICT COURT

ANSWER—August 23, 1950

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of the respondent, United States of America, to the libel of Konrad G. Johansen, alleges upon information and belief:

First: It admits that, at the times mentioned in the libel, it was a sovereign but denies that it has consented to be sued on the cause of action described in the libel.

[fol. 8] Second: It admits the truth of the allegation contained in Article Second.

Third: It admits the allegations contained in Article Third.

Fourth: It admits the allegations contained in Article Fourth.

Fifth: It denies the allegations contained in Article Fifth.

Sixth: It denies the allegations contained in Article Sixth.

Seventh: It denies the allegations contained in Article Seventh.

Further answering the libel herein the respondent says:

Eighth: At the times mentioned in the libel, the United States Army Transport *Kingsport Victory* was owned by the respondent and was a public vessel of the United States within the meaning of the Public Vessels Act, 46 United States Code, Section 781 et seq. At the time of the injuries complained of, the libelant was an employee of the United States aboard such vessel and entitled to the benefits provided by the United States Employees' Compensation Act, 5, United States Code, Section 751 et seq. On or about the 8th day of November, 1949, libelant filed a claim for compensation benefits under said Act and in addition to receiving medical treatment without charge to him, was paid compensation from the 9th day of August, 1949, through the 6th day of November, 1949, in the amount of $358.20, thereby electing to receive the benefits of said Act.

[fol. 9] Ninth: The only remedy available to the libelant was that provided by the United States Employees' Compensation Act and this suit is, therefore, one against United States of America without its consent and outside the scope of the Public Vessels Act.

Further answering the libel herein the respondent says:

Tenth: Such injuries as were sustained by the libelant were due solely to and were caused by the libelant's own negligence and were not caused or contributed to in any manner by negligence of the respondent.

Further answering the libel herein the respondent says:

Eleventh: If the libelant was injured as described in the libel, his injuries resulted from risks and dangers which were open, obvious and apparent, which he fully understood and which he assumed when he became a member of the crew of the United States Army Transport *Kingsport Victory*.

The premises are true.

Wherefore, respondent prays that the libel herein be dismissed with costs.

Irving H. Saypol, United States Attorney, Proctor for Respondent, 45 Broadway, New York 6, N. Y.

(Duly verified August 23, 1950.)

[fol. 10] UNITED STATES DISTRICT COURT

RESPONDENT'S NOTICE OF MOTION TO DISMISS

SIRS:

Please take notice that upon the annexed affidavit of Martin J. Norris, a motion will be made at a Stated Term of this Court for the hearing of motions, to be held in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 26th day of September, 1950 at 10:30 A. M., or as soon there after as counsel can be heard, for an order dismissing the above-entitled action on the ground that the libel fails to state a claim against respondent upon which relief can be granted or in the alternative that the Court hear and determine upon the hearing of this motion and in advance of trial the issues relating to the libelant's election to accept Federal employee's compensation benefits in lieu of any rights he might otherwise have had to obtain the relief sought in the libel and for an order to give effect to such determination.

Yours, etc., Irving H. Saypol, United States Attorney, Proctor for Respondent, 45 Broadway, New York 6, N. Y.

To William L. Standard, Esq., Proctor for Libelant, 38 Park Row, New York 7, N. Y.

[fol. 11] AFFIDAVIT OF MARTIN J. NORRIS, READ IN SUPPORT OF MOTION

STATE OF NEW YORK:
County of New York, ss:

Martin J. Norris, being duly sworn, deposes and says:

That he is Attorney, Department of Justice, and a Special Assistant in the office of Irving H. Saypol, Esq., United States Attorney for the Southern District of New York, Admiralty Division, and that he has been assigned the above-captioned case.

This affidavit is in support of a motion to dismiss the libel on the ground that it fails to state a claim against respondent upon which relief can be granted.

Libelant alleges that on August 5, 1949, while he was a seaman aboard the United States Army Transport *Kingsport Victory*, in the capacity of carpenter, he received certain injuries to his right leg when a wooden sheathing in the No. 4 hold collapsed as libelant was prying it apart. Johansen received first aid treatment and was then taken to the United States Marine Hospital at Staten Island. He was discharged on October 24, 1949, as fit for duty with recommended convalescence of fourteen days.

On October 13, 1949, Johansen made application to the Federal Security Agency, Bureau of Employees' Compensation, for compensation payments as a result of the injury which he sustained. An award was made to Mr. Johansen by the Bureau of Employees' Compensation and on November 30, 1949, by the U. S. Treasury check number 89,462,874 in the amount of Two Hundred Twenty-one and [fol. 12] 65/100 ($221.65), said payment was made to him. On December 28, 1949, a further payment in the amount of One Hundred Thirty-six and 55/100 ($136.55) was made and this payment was by means of U. S. Treasury check number 89,707,025. A certified copy of the General Accounting Office file regarding payments made to Johansen will be submitted to this Honorable Court at the hearing of the motion. The said file will show photostatic copies of the cancelled checks in question as well as the accounting records of the paying office.

It is respectfully submitted that libelant having filed a

claim under the Federal Employees' Compensation Act, and having received and accepted compensation, has elected his remedy and has surrendered any right of action he may have had against the United States for the injury sustained.

It is respectfully submitted that the libel does not state a cause of action against the United States of America under the Public Vessels Act (46 U. S. C. § 781 et seq.) or the Suits in Admiralty Act (46 U. S. C. § 741 et seq.) or any other act, and deponent prays that the said libel be dismissed.

Martin J. Norris.

(Sworn to September 14, 1950.)

[fol. 13] UNITED STATES DISTRICT COURT

LIBELLANT'S NOTICE OF MOTION FOR DISCOVERY AND INSPECTION

SIR:

Please take notice that on the annexed affidavit of Louis R. Harolds, sworn to the 14th day of September, 1950, and upon the pleadings and all proceedings heretofore had herein, the undersigned will move this Court on the 26th day of September, 1950, at the Court House located at Foley Square, New York, New York, at Room 506, at 10:30 A. M. of that day, or as soon thereafter as counsel can be heard, for an order granting the Libellant a discovery and inspection, with permission to make copies of the libellant's Federal Employees' Compensation file, medical records, abstracts, witnesses' reports, and accident reports, relating to injuries which the libellant sustained while in the employ of the respondent as a seaman on the U.S.A.T. *Kingsport Victory*, and for such other and further relief as may be just in the premises.

Dated: New York, New York, September 14, 1950.

Yours, etc., William L. Standard, Proctor for Libellant, 38 Park Row, New York, New York.

To: Irving H. Saypol, Esq., United States Attorney, 45 Broadway, New York 6, New York, Proctor for Respondent.

[fol. 14] AFFIDAVIT OF LOUIS R. HAROLDS, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss.:

LOUIS R. HAROLDS, being duly sworn, deposes and says:

I am a member of the firm of William L. Standard, proctor for the libellant in this matter and am familiar with the facts and circumstances heretofore had herein.

This is a seaman's suit to recover personal injuries sustained on or about August 5th, 1949, while libellant was in the employ of the respondent, the United States of America, aboard the U.S.A.T. *Kingsport Victory*, a public vessel.

As a result of this accident, the libellant received treatment at the U. S. Marine Hospital, Stapleton, Staten Island, from on or about August 5th, 1949, to on or about November 24th, 1949. An abstract from the clinical record has been requested of the U. S. Marine Hospital, but this abstract has been refused up to the present time, in view of this pending litigation. Neither the libellant nor your deponent has an abstract of this hospitalization, and it is obviously necessary in connection with this suit.

Respondent has interposed a defense to the effect that libellant was paid compensation benefits under the U. S. Employees' Compensation Act (5 U.S.C. 751 et seq.) from August 1, 1949 through November 6, 1949, in the amount of $358.20, and that acceptance of this sum by the libellant constitutes an election on his part, barring the libellant's right to institute this suit.

[fol. 15] On the other hand, the libellant contends that the amount which was paid to him was hardly enough to constitute a sufficient amount for even his maintenance payments, and did not take into consideration his right to damages by reason of the manner in which the accident occurred. Libellant further contends that he was at no time made aware that he had any right to sue for damages under the Public Vessels Act, and that he did not understand that acceptance of the limited benefits which he was given, constituted a waiver of any other rights given him by law. Not knowing of his other rights, he could not "elect".

It is now well established that even in the stronger instances in which the government takes a release from a

seaman, in exchange for paying him some maintenance, the release would not constitute a bar to any other rights which the seaman may have, where the government is unable to show that he has been made aware of his physical condition, and the extent of his legal rights. (*Muruaga* v. *U. S.*, 172 F. (2d) 318 (C. A. 2d, 1949).)

In order to assist the libellant in establishing the foregoing, libellant requests to be permitted a discovery and inspection of the Workmen's Compensation file under which the government paid him compensation benefits.

Libellant also seeks an examination of witnesses' statements and accident reports, in order to determine who was responsible for the lumber which collapsed when he was injured, and the names and addresses of persons whose depositions may be taken with reference to various aspects of the case.

Wherefore deponent respectfully requests that this Honorable Court will grant the relief sought in the notice of motion herein.

Louis R. Harolds.

(Sworn to September 14, 1950.)

[fol. 16] In United States District Court

Memorandum re Libellant's Motion—December 6, 1950

In view of my decision filed today this is moot.

Edward A. Conger, U. S. D. J.

In United States District Court

[Title omitted]

Memorandum re Respondent's Motion

The motion is granted upon the authority of *Frader* v. *United States*, 1950 A. M. C. 784; *Johnson* v. *United States*, 89 F. Supp. 65; *Militano* v. *United States*, 156 F. (2d) 599; *Dahn* v. *Davis*, 258 U. S. 421.

It is plain that the amendments of 1949 were not intended to change the prior rights of seamen except to the extent of

further coverage under the Act. See 95 Cong. Rec. 13874-13875.

The argument that the libellant could not have "elected" because he was unaware of an alternative is without merit. That type of reasoning would absolve him from, for example, the statute of limitations. Filing a claim and receiving compensation in payment thereof constitutes an effective election under the Act. *Parr* v. *United States*, 172 F. (2d) 462.

Johnsen v. *American-Hawaiian S. S. Co.*, 98 F. (2d) 847 involves rescission of an election made in ignorance where [fol. 17] no one's rights are prejudiced by such rescission. The U. S. would certainly be prejudiced here.

Settle order.

Dated: December 4, 1950.

Edward A. Conger, United States District Judge.

UNITED STATES DISTRICT COURT

ORDER DISMISSING LIBEL—Filed December 18, 1950

Respondent, United States of America, having duly moved this Court by Notice of Motion for an order dismissing the libel on the ground that the libel fails to state a claim against respondent upon which relief can be granted or in the alternative, that the Court hear and determine in advance of trial the issues relating to the libellant's election to accept federal employees' compensation benefits in lieu of any rights he might otherwise have had to obtain the relief sought in the libel and for an order to give effect to such determination, and said motion having been duly brought on for a hearing before me at a Stated Term for the hearing of motions on the 17th day of October, 1950;

Now, upon reading and filing the said Notice of Motion, the memoranda of law submitted herein and after hearing Martin J. Norris in support of said motion, and Louis R. Harolds, Esq., in opposition thereto, due deliberation having [fol. 18] been had and the Court having rendered its opinion granting the said Motion, it is

Ordered that the libel be and hereby is dismissed.

Edward A. Conger, U.S.D.J.

Dated: New York, New York, December 15, 1950.

UNITED STATES DISTRICT COURT

COUNTER ORDER DISMISSING LIBEL AND DENYING MOTION FOR DISCOVERY AND INSPECTION—Filed December 18, 1950

The libellant having duly moved this Court for an order granting him a discovery and inspection,

And respondent, United States of America, having thereafter duly moved this Court for an order dismissing the libel on the ground that it fails to state a claim against respondent upon which relief can be granted, or in the alternative that the Court herein determine in advance of trial the issues relating to the libellant's election to accept Federal Employees' compensation benefits in lieu of any rights he might otherwise have had to obtain the relief sought in the libel,

And both said motions having been heard before me at a Stated Term for the hearing of motions on the 17th day of October, 1950;

Now, on reading and filing the affidavit of Louis R. Harolds, duly sworn to the 14th day of September, 1950, submitted on behalf of the libelant, and the affidavit of Martin [fol. 19] J. Norris, Esq., duly sworn to the 14th day of September, 1950, submitted on behalf of the respondent, and upon a copy of the pleadings and proceedings heretofore had herein,

And respondent, by its counsel, having made the following concessions in open Court:

1. The government's position was and is that a seaman employed on a public vessel of the United States who receives personal injuries, is given a sole and exclusive remedy by the Federal Employees' Compensation Act, and he has no other remedy. In view of the government's position as stated above, libellant was never advised that he had a right to elect as between compensation benefits on the one hand, and a suit for damages for personal injuries, on the other.

2. The government voluntarily sent to the libellant compensation payments, without any hearings, and without any final adjudication, on receiving his application.

and the Court having rendered its opinion after considering all the foregoing and the briefs of the parties, it be and hereby is

Ordered, the the libel be and hereby is dismissed; and it is further

Ordered, that the libelant's motion for a discovery and inspection be and hereby is denied on the ground that same has become moot in view of the Court's determination dismissing the libel herein.

Dated: New York, New York, December 15, 1950.

U. S. D. J.
Unsigned.

[fol. 20] UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that photostatic copies of the exhibits be made, and,

It is further stipulated and agreed by and between the proctors for the respective parties hereto that 3 copies of the abovementioned photostats be handed to the Court on the day of the argument.

Dated, New York, April 6th, 1951.

William L. Standard, Proctor for Libellant-Appellant.

Irving H. Saypol, Proctor for Respondent-Appellee.

Stipulation as to Record (omitted in printing).

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 22] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1950

No. 275

Argued May 4, 1951. Decided July 30, 1951

Docket No. 22012

KONRAD G. JOHANSEN, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellee

Before L. Hand, Chase and Frank, Circuit Judges

Appeal from an order of the District Court for the Southern District of New York dismissing the libel in a suit by a civil service employee for personal injuries while serving as a seaman on an army transport. Affirmed.

William L. Standard, Proctor for Libellant-Appellant; Louis R. Harolds, of Counsel.

Holmes Baldridge, Assistant Attorney General, Irving H. Saypol, United States Attorney, Leavenworth Colby, Special Assistant to the Attorney General, Martin J. Norris, Attorney, Department of Justice, for Respondent-Appellee.

[fol. 23] CHASE, Circuit Judge:

This appeal requires us to decide whether a civil service employee of the United States who is employed as a member of the crew of an army transport may sue the government, under the Public Vessels Act, 46 U. S. C. §§ 741-749, to recover for personal injuries received in line of duty, or must accept as sole compensation an award under the Federal Employees Compensation Act, 5 U. S. C. § 751 *et seq.*

The appellant, Johansen, was a member of the crew of the U. S. A. T. "Kingsport Victory" as a civil service employee of the United States and not as a member of the armed forces. We understand that the parties agree that the transport was engaged in a military operation when he was, on August 5, 1949, hit by falling lumber and injured,

allegedly because of the negligence of the appellee or because of the unseaworthiness of the vessel. He was admitted to a marine hospital where he received treatment until, on October 24, 1949, he was discharged as cured.

The appellant was informed by his superiors, acting on behalf of the United States, that he, as a member of the civil service component of the crew of an army transport, had no right against the United States except to receive compensation benefits under the United States Employees Compensation Act. Believing this information to be correct and induced by it, he duly made application for such benefits and was awarded and paid in all $358.20. On November 7, 1949, he resumed his duties on full pay and his compensation payments were terminated. He then brought this suit, and appeals from a judgment which dismissed his libel on the ground that the acceptance of the compensation award was an election constituting a waiver of whatever right to sue he may have had.

[fol. 24] We need not decide whether the appellant is disabled from bringing this suit by an election to accept a compensation award; since, the government not having consented to be sued, that was his only remedy.

If *Johnson* v. *United States*, 4 Cir., 186 F. 2d 120, is to be read as holding that a civilian seaman on a patrol boat may sue the United States under the Public Vessels Act for injuries suffered in military operation, we are, with deference, constrained to disagree. This case falls within the category to which *Bradey* v. *United States*, 2 Cir., 151 F. 2d 742, cert. denied 326 U. S. 795, belongs. We there held, following *Dobson* v. *United States*, 2 Cir., 27 F. 2d 807, cert. denied 278 U. S. 653, that a naval enlistee serving as a member of the crew of a public vessel was not permitted by the Public Vessels Act to sue the government for personal injuries received in line of duty, and that such injuries were compensable only under the special provisions of law applicable to naval personnel. We took it to be a significant indication of the intent of Congress that it had, by the War Shipping Administration (Clarification) Act of March 24, 1943, 57 Stat. 45, 50 U. S. C. Appendix § 1291, *et seq.*, given to officers and crew members employed by the War Shipping Administration a right to sue the United States for death or injury, but denied them the benefits of com-

pensation as United States employees. Similarly, in *Feres* v. *United States*, 2 Cir., 177 F. 2d 535, aff'd 340 U. S. 135, we held that an employee entitled to compensation as a member of the armed forces was precluded by that right from maintaining suit against the government under the Tort Claims Act for injuries received in line of duty.

Since the appellant would have been limited to suit if he had been employed aboard a merchant vessel of the United States, and to compensation if a member of the military service, allowing him but one means of recovery [fol. 25] will appropriately fit "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States*, 340 U. S. 135, 139.

Nor is it unreasonable to impute to Congress an intention to confer similar rights upon civilian and military members of the crew of a public vessel. The civilian component of the crew of an army transport is subject to military law just as the enlisted part of the crew. *Ex parte Falls*, D. N. J., 251 Fed. 415; *Ex parte Gerlach*, S. D. N. Y., 247 Fed. 616. Obedience by all members of the crew under the same sanctions may well be indispensable to the required maintenance of discipline in a military operation. Suits by civilian seamen, no less than by military personnel, would require judicial re-examination of the conduct of military affairs. We should not, without clear warrant in the statutory language, attribute to Congress an intent to permit civilian members of the crew of such a vessel to have an election denied enlisted members of the crew. The first have their rights under the Federal Employees Compensation Act, the second their rights as enlisted men to be compensated for service-connected injuries; the first, no more than the second, have been given the right to elect to sue the government rather than to accept such compensation.

Affirmed.

FRANK, Circuit Judge, dissenting:

I agree with the reasoning of *Johnson* v. *United States*, 186 F. (2d) 120 (C. A. 4). Accordingly, I think libellant had an election. The government, at oral argument, agreed

that libellant's superiors led him to believe that his sole remedy was under the Compensation Act. I think, therefore, that he never actually exercised his election.

[fol. 26] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of July, one thousand nine hundred and fifty-one.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

KONRAD G. JOHANSEN, Libellant-Appellant,

v.

UNITED STATES, Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk.

[fol. 27] [Endorsed:] United States Court of Appeals, Second Circuit. Konrad G. Johansen v. United States. 275. Judgment. United States Court of Appeals, Second Circuit. Filed July 30, 1951. Alexander M. Bell, Clerk.

[fol. 28] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 401

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 2, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.